

PUEBLO OF ZUNI CONCERNED COMMUNITY CITIZENS COMMITTEE

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-47-A

Decided February 12, 1986

Appeal from a decision of the Acting Deputy Assistant -Secretary-Indian Affairs (Operations) denying appellant's petition for a Secretarial-held election to vote on the temporary suspension of the Zuni Constitution.

Affirmed.

1. Indians: Law and Order: Tribal Constitutions, Bylaws, and Ordinances--Indians: Tribal Government: Elections

Petitions for Secretarial action filed under 25 CFR Part 82 are limited to requests for the Secretary to call elections to amend tribal constitutions, to issue charters pursuant to a Federal statute, and for other purposes where constitutions and charters provide for petitioning to effect action by the Secretary.

2. Indians: Law and order: Tribal Constitutions, Bylaws, and Ordinances--Indians: Tribal Government: Elections

An election called by the Secretary pursuant to 25 CFR Part 81 is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials.

APPEARANCES: Jobeth Mayes and Margaret S. Wilson, Esq., for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE HORTON

On September 12, 1985, the Board of Indian Appeals (Board) received a notice of appeal from the Pueblo of Zuni Concerned Community Citizens Committee (appellant). Appellant sought review of an August 30, 1985, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) denying appellant's petition to hold a Secretarial election on the Pueblo of Zuni (Pueblo). For the reasons discussed below, the Board affirms that decision.

Background

Although traditionally governed by a tribal council chosen by the high priest, the Pueblo of Zuni adopted a written constitution in accordance with the provisions of the Indian Reorganization Act, June 18, 1934, 25 U.S.C. § 476 (1982), 1/ which was approved by the Assistant Secretary of the Interior on August 13, 1970.

Article XVII, § 3, of the Zuni Constitution sets forth procedures to be followed when the governor of the Pueblo dies in office: "In the event the governor * * * dies * * *, his unexpired term shall be filled by the lieutenant governor. The head councilman will succeed to the office of the lieutenant governor. An election will be called to replace the head councilman." The present appeal was precipitated on July 2, 1983, when the governor of the Pueblo died. Appellant contends procedures required by the Pueblo's Constitution were not followed.

1/ All references to U.S.C. are to the 1982 edition.

Apparently there is no dispute that the lieutenant governor properly succeeded to the office of governor, or that the head councilman properly succeeded to the office of lieutenant governor. Appellant states, however, that the position of head councilman was not filled through an election, but instead another councilman was elevated to the position of head councilman. Appellant argues that this procedure was unconstitutional and that this conclusion is supported by a July 14, 1983, tribal court opinion sent to the governor and tribal council and signed by the chief tribal judge and each of the two associate judges. This opinion states:

With all due respect to the Zuni Tribal Council, your memorandum dated July 11, 1983 is unlawful and unconstitutional in part.

Unconstitutional because, Article XVII, section 3, governs the situation which affects the Governor, Lt. Governor and the Head Councilman's position. It is pretty specific on how it should be conducted.

* * * * *

Unlawful because the election for Head Councilman was not conducted accordingly and in conformity with Article XV of the Zuni Constitution and the Election Code.

The succession of the Governor and Lt. Governor is proper but the way it was made known was improper. We are at your service in regards to the interpretation of the Zuni Constitution.

* * * * *

The Zuni Tribal Court acts within its authority in rendering this opinion and is not meant to be taken as an infringement upon the other branches of the Zuni Tribal Government.

Appellant maintains that from July to December 1983, it sought an election from the tribal council. When its efforts failed, it circulated a petition from January to July 1984, seeking recall of the council. Although

appellant contends that its petition, which received 800 signatures, was legally sufficient, the council found that there were insufficient certified signatures. Appellant alleges that the council counted the names without the presence of counters representing it, and that 61 names were withdrawn after the individuals received threats from council members.

In addition, on August 15, 1984, in the face of the recall petition, the council adopted Resolution No. M70-84-S142. According to appellant, this resolution adopted a new election code with retrospective application which permitted the council to conclude the petition for recall was legally insufficient under the new rules.

Appellant states that on September 6, 1984, the Zuni religious leaders, in accordance with the traditional governing system, appointed an alternative tribal council. A written statement of these appointments was notarized on May 20, 1985.

On November 13, 1984, the council held an election for the last councilman. Appellant sought an injunction in tribal court to prevent this election. On November 19, 1984, the tribal court held that it lacked jurisdiction to hear the case because of "sovereign immunity."

On May 21, 1985, appellant filed a second petition. This petition, which was filed with the Bureau of Indian Affairs (BIA), sought a Secretarial election under 25 U.S.C. § 476 and 25 CFR Parts 81 and 82, 2/ to determine

2/ The distinction between "Secretarial elections" and "tribal elections" is defined in 25 CFR 81.1(s) as: "Secretarial election" means an election

whether to temporarily suspend the Zuni Constitution and whether the Federal Government should recognize the new tribal council appointed by the Zuni religious leaders as a temporary governing council of the Pueblo until a general election could be held and new officers installed.

The Superintendent of the Zuni Agency, BIA, forwarded the petition to the Albuquerque Area Director (Area Director), BIA, on May 23, 1985. After verification of the signatures on the petition, the Area Director forwarded the petition to appellee on June 18, 1985. The transmittal memorandum states at pages 1-2:

As you are aware, the situation at Zuni has been unstable since the election of the current slate of officials. The Bureau has recognized and supported the duly elected officials as the government of Zuni. Through the proper petition and special Secretarial Election process, the populace is peacefully and legally requesting a vote to allow the people of Zuni to decide whether they should continue with the current situation or to take action to resolve their internal disputes.

* * * * *

Based upon the proper securing of signatures calling for a Secretarial Election and the proper certification of the signatures, this memorandum with the noted attachments [is] being forwarded to you with the recommendation that you approve a Secretarial Election as soon as possible.

fn. 2 (continued)

held within a tribe pursuant to regulations prescribed by the Secretary as authorized by Federal Statute (as distinguished from tribal elections which are conducted under tribal authority. (See Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085 (8th Cir. 1977), cert. denied 439 U.S. 820 (1978))." (Emphasis in original.)

Accordingly, Article XVII, sections 2, 3, and 5 of the Zuni constitution provides for the recall and replacement of tribal officials by means of tribal rather than Secretarial elections.

Despite the recommendation of the Area Director, on August 30, 1985, appellee declined to grant the petition. Appellee's decision letter stated:

We have received the June 18, 1985 memorandum and accompanying documents from the Albuquerque Area Office regarding a petition to request the calling of a Secretarial election to vote on temporary suspension of the Zuni Constitution.

A thorough review of the subject petition and related documents shows the language of the petition requests a "Secretarial election under 25 U.S.C. Sec. 476, and 25 CFR 81 and 82 to determine whether the Zuni people wish to temporarily suspend the Zuni Constitution" Neither 25 U.S.C. Sec. 476 nor 25 CFR 81 and 82 addresses a temporary suspension. On the face of the petition, it does not meet the requirements needed to call a Secretarial election. The memorandum from the Albuquerque Area Office, however, interprets the "temporary suspension" to mean a desire to rescind the Zuni Constitution. If this petition was intended to be a request for revocation of the Zuni Constitution, the regulations in 25 CFR 81.5 do not provide for the calling of a Secretarial election for revocation of a constitution through the petition process directly to the Secretary. The petition provisions used by the petitioners pursuant to Article XIX of the Zuni Constitution do not apply in this instance. We look to 25 CFR 81.5(a) which states in part that "The Secretary shall authorize the calling of an election . . . to revoke a constitution and bylaws, upon a request from the tribal government." In order to revoke a tribal constitution the people of a tribe must work through their tribal government. Although the regulations do not provide direct access to the calling of a Secretarial election for revocation of a constitution by the people of a tribe, this does not mean the people of the Pueblo of Zuni have no recourse. Under Article XX of the Zuni Constitution the people of the Pueblo of Zuni could petition the tribal council demanding a referendum vote on whether or not the tribal council should be compelled to ask the Secretary to call an election for revocation of the Zuni Constitution. By using the referendum article to compel the tribal council to request a Secretarial election to revoke the constitution, the Zuni people could start the first part of a two-part process to revoke the Zuni Constitution, if indeed revocation of the constitution is desired. The petitioners might also consider asking the Zuni tribal court for a determination on whether or not the subject petition could be used as the petition for the referendum vote. Petitioners are encouraged to seek relief through the tribal form whenever possible.

* * * The petition asks to replace the present governing officials with "newly appointed Council members." This action is, in effect, a recall of the present tribal officials. The Zuni Constitution has provisions for recall of tribal officials.

This action is not an appropriate request under 25 CFR, Parts 81 and 82. In fact, the June 18 memorandum states that the petitioner's first petition, which called for a tribal election to recall the present council, was dismissed because of insufficient verified signatures. The petitioners have the option open to them to try again to obtain the required number of signatures to call a tribal election to recall tribal officials. It appears the petitioners instead greatly expanded the scope of the second petition by asking for a Secretarial election to 1) temporarily suspend the Zuni Constitution; 2) recall the present officials; and 3) replace the present Council with a Council chosen by the Head Cacique. The petitioners have seemingly tried to consolidate several separate actions into one petition. Although we can understand the desire for immediate action, the requested actions sought by the petition are not appropriate for Secretarial action. We, therefore, find the subject petition not to be valid and the request to call a Secretarial election is denied.

The petition and related documents seem to indicate a growing frustration on the part of the petitioners to seek one remedy which will eliminate several perceived problems. Although we understand the petitioner's desire to seek immediate relief, it is sometimes not possible to resolve the situation with one action. We would suggest the following alternatives as possible remedies to the situation which appears to be of growing concern at the Pueblo of Zuni:

- 1) The Zuni Constitution provides for amendment to the constitution under Article XIX.
- 2) Tribal officials may be recalled pursuant to Article XVII, Sec. 2 of the constitution.
- 3) Article XX of [the] constitution provides for referendum vote to compel tribal council action.
- 4) 25 CFR 81.5 provides for revocation of a constitution and bylaws upon a request from tribal government.

We would urge the people of the Pueblo of Zuni to work together to find ways to resolve the current situation that will be in the best interests of all the Zuni people.

The Board received appellant's notice of appeal from appellee's decision on September 12, 1985. Because of the importance of the situation and concern expressed by the New Mexico congressional delegation, expedited consideration of the appeal was granted by the Director of the Office of Hearings

and Appeals on October 3, 1985. The Board received the administrative record from BIA on October 17, 1985. Neither the BIA nor the Office of the Solicitor on its behalf has filed a response to the notice of appeal and statement of reasons filed by appellant.

Discussion and Conclusions

[1] Appellee's decision denying appellant's petition for a Secretarial election to temporarily suspend (or revoke) the tribal constitution, and to recall and replace tribal officials, is based on the conclusion that "the requested actions sought by the petition are not appropriate for Secretarial action" because (1) a Secretarial election to "temporarily suspend" a tribal constitution is not authorized by either 25 U.S.C. § 476 or 25 CFR Parts 81 and 82; (2) though authorized by these legal authorities, a Secretarial election "to revoke" a tribal constitution may be requested only by the tribal government itself, and not directly through a petition by individual tribal members (see 25 CFR 81.5(a)); and (3) the recall and replacement of tribal officials are governed by the tribal constitution and are not proper subjects for a Secretarial election.

Appellant's petition stated in pertinent part:

THEREFORE, the undersigned Zuni voters hereby petition for a Secretarial election under 25 U.S.C. §476 and 25 C.F.R. Parts 81 and 82 to determine whether the Zuni people wish to temporarily suspend the Zuni Constitution and whether the federal government should recognize the new Tribal Council appointed by the Zuni religious leaders on September 6, 1984 as a temporary Governing Council of the Pueblo until a general election can be held and new officers can be installed.

Petitions for Secretarial action or elections are governed by regulations set forth in 25 CFR Part 82, "Petitioning Procedures for Tribes Reorganized Under Federal Statute and other organized Tribes." According to 25 CFR 82.11, "Any petition submitted under this part, shall be considered only for the purpose stated therein." Appellant's petition is therefore bound by its terms and must be considered a petition for the temporary suspension of the constitution and the recognition of the putative second tribal council.

The petition was filed under 25 CFR Part 82. Section 82.2 sets forth the purpose and scope of Part 82 as follows:

The purpose of this part is to provide uniformity and order in the formulation and submission of petitions requesting the Secretary or the Commissioner to call elections to amend tribal constitutions, to issue charters pursuant to a Federal Statute, and for such other purposes where constitutions and charters provide for petitioning to effect action by the Secretary or Commissioner.

Appellant's petition does not seek an election to amend the tribal constitution or to issue a charter; nor does the Zuni Constitution provide for petitioning to effect action by the Secretary to temporarily suspend the tribal constitution or recall and replace tribal officials. The petition therefore is outside the scope of Part 82 and was not submitted in accordance with its provisions. ^{3/}

^{3/} That petitions for Secretarial action or election must be within the scope of section 82.2 is reiterated in section 82.4:

"All members eligible to vote in elections conducted by a tribe shall be entitled to sign petitions to effect actions by the Secretary or Commissioner within the scope of § 82.2; provided, that where a tribe is recognized pursuant to a Federal Statute, only persons eligible to register for Secretarial elections may petition."
(Emphasis added.)

[2] Similarly, the petition is likewise outside the purpose and scope of Part 81, "Tribal Reorganization Under A Federal Statute." Section 81.2(a) provides:

The purpose of this part is to provide uniformity and order in:

- (1) Holding Secretarial elections for voting on proposed constitutions when tribes wish to reorganize,
- (2) Adopting constitutional amendments,
- (3) Ratifying and amending charters,
- (4) Revoking constitutions, and
- (5) Facilitating the calling of such elections by the Secretary under provisions of a Federal Statute.

A Secretarial election pursuant to Part 81 therefore is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials. Neither the Federal statute (25 U.S.C. § 476) nor the Federal regulations (25 CFR Part 81) upon which appellant relies authorizes a Secretarial election for the purposes appellant's petition requests. A temporary suspension of a tribal constitution is not authorized by the statute or the regulations cited by appellant. If by temporary suspension, appellant actually meant revocation, which is authorized by 25 U.S.C. § 476 and 25 CFR Part 81, appellant's petition nevertheless fails because according to section 81.5(a) the Secretary is authorized to call a Secretarial election only "upon a request from the tribal government." As to recalling and replacing tribal officials, Article XVII, sections 2, 3, and 5 of the Zuni Constitution provides for tribal elections, and not for Secretarial elections, to accomplish these purposes. A Secretarial election then is not appropriate for the purposes appellant seeks. For the above reasons, appellee's decision must be affirmed.

Appellant was properly advised by appellee that the relief it desires should be sought through tribal channels. The concurring opinion, while agreeing that tribal remedies have not been fully pursued, cites an unpublished Federal district court opinion, Milam v. United States Department of the Interior, No. 82-3099 (D.D.C. Dec. 23, 1982), for the proposition that the BIA, in accordance with its trust responsibilities, must carefully monitor the situation at the Pueblo of Zuni "and, if necessary, take action to ensure the legality of the tribal government and the integrity of the tribal constitution" and that failure to do so "will constitute a breach of the trust responsibility." While the exact parameters of the Secretary's trust responsibility have not been established, the majority is reluctant to embrace Milam as a license to intervene in tribal government disputes. 4/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 30, 1985, decision of the Acting Deputy Assistant Secretary--Indian Affairs (operations) is affirmed.

Wm. Philip Horton
Acting Chief Administrative Judge

I concur:

Bernard V. Parrette
Alternate Member

4/ To the extent that Milam holds there is a BIA responsibility in carrying on government-to-government relations with Indian tribes to recognize and deal with a single governing body, the Board agrees. See, e.g., Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983). Here, there is no evidence that the BIA is not fulfilling its obligations to the Pueblo in furtherance of its government-to-government relationship.

ADMINISTRATIVE JUDGE MUSKRAT SPECIALLY CONCURRING:

Although I concur with my colleagues regarding the infirmities of appellant's petition and the inappropriateness of a Secretarial election for the purposes sought by the appellant, I believe still another matter merits discussion.

The present case raises the very delicate issue as to the circumstances under which the United States Government, through the Department of the Interior and BIA, may interpose itself into the internal political affairs of a sovereign Indian nation. In St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 222-38, 89 I.D. 132, 141-48 (1982), this Board discussed at great length the interrelationship between the Federal trust responsibility and tribal sovereignty, and found that although there is an inherent tension between these doctrines of Indian law, they are nevertheless compatible within their respective spheres. The conclusion of St. Pierre, that the Federal Government owes a trust responsibility to preserve and protect tribal governments organized under the Indian Reorganization Act of 1934, was disapproved in part in Burnette v. Deputy Assistant Secretary-Indian Affairs (Operations), 10 IBIA 464, 464-65 n.1, 89 I.D. 609, 609-10 n.1 (1982), on the grounds that this conclusion represented a policy determination which "had not been previously articulated by a court or this Department." On December 23, 1982, after the decisions in both St. Pierre and Burnette, the District Court for the District of Columbia issued a decision in Milam v. United States Department of the Interior, No. 82-3099 (D.D.C. Dec. 23, 1982), 10 Indian L. Rep. (Am. Indian Law Training Program) 3013 (1982), in which the court

concluded that there was a Federal trust responsibility to preserve and protect tribal governments and their constitutions:

The obligation of the BIA to review a tribal constitution is justified under its trust responsibility to administer the government-to-government relations between the United States and the Indian tribes. * * * As trustee, the United States is charged with the responsibility of safeguarding, from both external and internal threats, the political existence of Indian tribes, including protecting and guaranteeing tribal self-government and the political rights of Indians. In administering this trust responsibility the BIA must ensure that Indian rights to self-government are preserved, protected and guaranteed. The impeachment of elected Indian officials may well be the most serious representative action taken by a tribe. As such, it is the responsibility of the BIA to ensure that such actions are taken in compliance with the tribal constitution, and that the agency refrain from recognizing any such action taken in violation of the constitution. Nevertheless, measures taken by the BIA to ensure Indian compliance with their constitution must be narrowly tailored so as to be least disruptive of tribal sovereignty and self-determination, yet fulfill the trust responsibility of protecting the integrity of the Indian political process.

Under the circumstances, the court finds that the BIA was obligated under its trust responsibility to determine who, for the purposes of relations with the BIA, was to be the tribal representative. The BIA knew that an election had been concluded, and that a quorum of council members had impeached the Chief and Assistant Chief. The simple fact is that the BIA was forced to recognize someone as the legitimate tribal representative and that to do so the Secretary was forced to review the procedures followed at and prior to the meeting to determine whether such procedures were in compliance with the Indian constitution. The stalemate that existed in tribal administration following the September meeting, constituted an imminent and substantial threat to the tribal government and the action taken by BIA was related to its fulfillment of its responsibilities and was narrowly drawn so as to be least disruptive of tribal sovereignty and self-determination.

* * * The BIA's review of the actions taken by the dissident faction was not primarily concerned with the actions of the tribal government. Rather the BIA was concerned with its own responsibility to administer its trust duties to the Indian people. [Footnote omitted.]

With reference to the present case the Milam decision recognizes the BIA's trust responsibility toward tribal governments and their constitutions while simultaneously admonishing that BIA traverse a very narrow path when contemplating action against a tribal government because of violations of the tribal constitution, and that the action undertaken must be restricted so as to avoid trespassing on the tribe's legitimate sphere of sovereignty and self-government.

I believe appellee's decision in the present case correctly abides with Milam. Appellee notes that appellant has not exhausted all possible tribal remedies, and consequently urges appellant to continue to work within the tribal structure for a resolution of the present problem. In essence, appellee states that a tribe should be given the initial opportunity to solve its own internal political disputes. Both St. Pierre and Milam observed this limitation on Federal involvement while upholding Federal action after finding that tribal remedies were stalemated or totally frustrated. In Stands Over Bull v. Billings Area Director, 6 IBIA 98, amended on other grounds, 6 IBIA 117 (1977), this Board similarly reversed a BIA decision concerning the legitimacy of tribal government action when it was shown that tribal remedies had not been exhausted. See also Potter v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 33, on reconsideration, 10 IBIA 134 (1982).

Appellant has pursued tribal remedies for over 2-1/2 years. Those remedies have, for appellant, so far proven frustratingly unresponsive and unproductive. As long, however, as there is a reasonable possibility that the tribe may be able to resolve its own internal political problems, BIA

should be reticent to interpose itself into the process. Once tribal procedures have run their course, BIA must satisfy its responsibility that tribal governments and their actions are legitimate under tribal law. As previously noted, both St. Pierre and Milam upheld BIA actions in response to the unconstitutional acts of tribal governments.

Accordingly, under the circumstances of the present case, appellant in my judgment must first exhaust tribal remedies in seeking resolution of its dispute prior to seeking relief from BIA. BIA, in turn, is on notice of constitutional violations involving the Zuni tribal government and consequently must, in accordance with its responsibilities, continue to monitor the situation carefully and, if necessary, take action to ensure the legality of the tribal government and the integrity of the tribal constitution. Such action is not, as characterized by the majority, "a license to intervene in tribal government disputes," but rather an independent obligation arising under law. Failure of the Bureau to take necessary action will constitute a breach of the trust responsibility and a derogation of the government-to-government relationship.

Jerry Muskart
Administrative Judge